Suruhanjaya Perkhidmatan Awam Malaysia v Noordin bin Hassan

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-01-1-95
MAHADEV SHANKAR, VC GEORGE JJCA AND ABDUL MALEK J
31 JULY 1995

Administrative Law *— Remedies — Certiorari — Decision of Public Services Commission — Dismissal of customs officer — Officer alleged he was given one day's notice to attend inquiry — Application for adjournment refused — Whether refusal unreasonable — Whether a ground to quash decision to dismiss — Whether refusal sufficiently proved*

Public Servants *— Dismissal — Customs officer — Officer alleged he was given one day's notice to attend inquiry — Application for adjournment refused — Whether refusal unreasonable — Whether a ground to quash decision to dismiss — Whether officer innocent because he was not jointly charged with third party who had pleaded guilty to offence*

Evidence *— Adverse inference — Failure to produce material evidence — Customs officer dismissed from service — Officer alleged he was given one day's notice to attend inquiry — Officer alleged Public Services Commission unreasonably refused to grant adjournment — Public Services Commission denied request for adjournment was made — Officer did not produce relevant material to support allegation — Whether adverse inference should be drawn against officer — Evidence Act 1950 s 114(g)*

The respondent, who was a customs officer, was dismissed by the appellant on the ground that he had smuggled certain goods from Singapore whilst on duty, and had handed them over to a Wong Hong Hua on 12 October 1989 at Johor Bahru. Before dismissing the respondent, the appellant requested the respondent to show cause as to why he should not be dismissed. The respondent wrote a letter, in which he denied the charge, and demanded an inquiry to permit him to cross-examine the witnesses against him, and to call witnesses in his own defence. The respondent also claimed, inter alia, that Wong Hong Hua had already admitted his guilt to the offence of knowingly participating in bringing in uncustomed goods, and that pointed to his innocence. Thereafter, the respondent was informed by a Puan Habsah bte Hj Harun through a letter that a committee of inquiry had been set up to examine the witnesses and to investigate the matter further on 17 November 1993. The respondent claimed that he received the letter only on 16 November 1993, and that although he had requested for an adjournment from the Deputy Director of Customs, ie Puan Zaleha bte Hamzah, it was unreasonably refused. However, the respondent did not explain why he did not return the acknowledgement of the receipt of the letter to the appellant. On 8 February 1994, the respondent received a letter from the appellant which stated that it had decided to dismiss him from service after careful consideration. The respondent made an application to the High Court for an order of certiorari to quash the

decision, on the grounds that the unreasonable refusal of adjournment had vitiated the dismissal, and that the appellant's decision was reached based upon the material contained in the show cause letter. However, the respondent was not able to adduce any evidence to disprove Puan Zaleha bte Hamzah's denial that such a request for adjournment had been made to her. The trial judge quashed the decision of the appellant for unreasonably refusing to grant the adjournment to the respondent, and held that the respondent was innocent or he would had been jointly charged with Wong Hong Hua. The appellant appealed.

Held, allowing the appeal:

(1) The granting of an adjournment is always a discretionary matter, and whether a refusal is so unreasonable as to vitiate the decision reached is a matter to be considered in the light of all the circumstances.

(2) It is the duty of a person applying for certiorari to show utmost good faith in the presentation of the material upon which he wishes the court to rely. In a situation where the respondent was relying so heavily on the alleged refusal to grant an adjournment, the failure to produce such material evidence must result in s 114(g) of the Evidence Act 1950 being invoked, and an adverse inference must be drawn against the respondent.

(3) Indeed, the proper inference was that the respondent did not ask for an adjournment. If he had done so, he would have comprehensively disclosed at the earliest opportunity when and from whom he and his counsel had asked for an adjournment and in what circumstances their requests were refused. The respondent also failed to explain why he did not return the acknowledgement of receipt to the appellant.

(4) If the respondent's counsel had made a request for adjournment, it must have been at the inquiry of the committee. As such, it was the record of that inquiry that should be the subject of the certiorari, and it was thus the respondent's duty to produce a record of the inquiry or to explain its absence to the court. However, he had failed to do so. Even if the inquiry had not taken place, there should be positive evidence to that effect.

(5) The finding of the trial judge that the omission to charge the respondent jointly with Wong Hong Hua showed that the respondent was innocent was not justified. Furthermore, the trial judge was relying solely on the show cause letter and the respondent's reply in making the conclusion.

[Bahasa Malaysia summary

Penentang, yang merupakan seorang pegawai kastam, telah dipecat oleh perayu atas alasan bahawa beliau telah menyeludup barangan

A yang tertentu dari Singapura semasa beliau bertugas, dan telah menyerahkan barangan tersebut kepada seorang bernama Wong Hong Hua pada 12 Oktober 1989 di Johor Bahru. Sebelum memecat penentang, perayu telah meminta penentang menunjukkan sebab kenapa beliau tidak harus dipecat. Penentang telah menulis sepucuk surat, di mana beliau telah menafikan tuduhan yang dibuat itu, dan mendesak supaya suatu siasatan diadakan untuk membolehkannya memeriksa balas saksi yang memudaratkannya, dan memanggil saksi yang dapat membelanya. Penentang juga mengata, antara lain, bahawa Wong Hong Hua telahpun mengaku salah atas kesalahan menyertai dalam membawa masuk barangan yang belum dicukai dengan disedarinya, dan ini menunjukkan bahawa beliau tidak bersalah. Selepas itu, penentang telah diberitahu oleh seorang bernama Puan Habsah bte Hj Harun melalui sepucuk surat bahawa suatu jawatankuasa siasatan telah dibentuk untuk memeriksa saksi dan menyiasat perkara itu selanjutnya pada 17 November 1993. Penentang mendakwa bahawa beliau telah menerima surat itu hanya pada 16 November 1993, dan walaupun beliau telah meminta suatu penangguhan daripada Timbalan Pengarah Kastam, iaitu Puan Zaleha bte Hamzah, permintaan tersebut telah ditolak dengan tidak munasabahnya. Walau bagaimanapun, penentang tidak menjelaskan kenapa beliau tidak mengembalikan pengakuan penerimaan surat itu kepada perayu. Pada 8 Februari 1994, penentang telah menerima sepucuk surat daripada perayu yang menyatakan bahawa ia telah membuat keputusan untuk memecatnya selepas pertimbangan yang teliti telah dibuat. Penentang telah membuat suatu permohonan kepada Mahkamah Tinggi untuk suatu perintah certiorari untuk membatalkan keputusan tersebut, atas alasan bahawa penolakan penangguhan secara tidak munasabah itu telah menjadikan pemecatan tersebut tidak sah, dan bahawa keputusan perayu dicapai berdasarkan bahan yang terkandung di dalam surat tunjuk sebab. Walau bagaimanapun, penentang tidak dapat mengemukakan sebarang keterangan untuk mematahkan penafian Puan Zaleha bte Hamzah bahawa permintaan tersebut untuk suatu penangguhan telahpun dibuat kepadanya. Hakim perbicaraan telah membatalkan keputusan perayu atas alasan bahawa keengganannya untuk memberikan penangguhan kepada penentang adalah tidak munasabah, dan memutuskan bahawa penentang adalah tidak bersalah, kerana beliau tidak dituduh dengan Wong Hua Hong secara bersama. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Pemberian penangguhan selalunya merupakan suatu perkara budi bicara, dan sama ada suatu penolakan adalah begitu tidak munasabah sehingga ia menjadikan tidak sah suatu keputusan yang dicapai adalah suatu perkara yang harus dipertimbangkan dengan mengambil kira seluruh keadaan.

(2) Adalah merupakan kewajipan orang yang memohon untuk perintah certiorari untuk menunjukkan bahawa beliau bersuci hati dalam mengemukakan bahan yang beliau ingin meminta mahkamah bergantung pada. Di dalam keadaan di mana penentang amat bergantung kepada keengganan untuk memberikan penangguhan yang dikatakan itu, kegagalan untuk mengemukakan keterangan material yang berkenaan akan menyebabkan s 114(g) Akta Keterangan 1950 terpakai, dan inferens yang bertentangan harus dibuat terhadap penentang.

(3) Sesungguhnya, kesimpulan yang wajar ialah bahawa penentang tidak meminta untuk suatu penangguhan. Jika beliau telah berbuat demikian, beliau tentu akan mengemukakan secara menyeluruh pada peluang yang terawal bila dan daripada siapa beliau dan peguamnya telah meminta untuk suatu penangguhan dan di dalam keadaan apa permintaan mereka telah ditolak. Penentang juga gagal menerangkan kenapa beliau tidak mengembalikan pengakuan penerimaan surat kepada perayu.

(4) Jika peguam penentang telah membuat suatu permintaan untuk penangguhan, ia pastinya dibuat di siasatan jawatankuasa. Dengan itu, rekod siasatan itulah yang harus merupakan subjek certiorari, dan maka adalah kewajipan penentang untuk mengemukakan rekod siasatan atau menerangkan ketiadaannya kepada mahkamah. Walau bagaimanapun, penentang gagal berbuat demikian. Jikapun siasatan tidak dijalankan, sepatutnya terdapat keterangan positif yang menunjukkan sedemikian.

(5) Keputusan hakim perbicaraan bahawa kegagalan untuk mempertuduhkan penentang bersama dengan Wong Hong Hua telah menunjukkan bahawa penentang adalah tidak bersalah adalah tidak berjustifikasi. Lagipun, hakim perbicaraan bergantung hanya pada surat tunjuk sebab dan balasan penentang dalam membuat kesimpulannya itu.]

[*Editorial Note*: The respondent has filed an application for leave to appeal to the Federal Court vide Civil Application No 08–64–95.]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 96–227.

For cases on dismissals of public servants, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 17; 10 *Mallal's Digest* (4th Ed) paras 1324–1359; [1992] Mallal's Digest 1441–1442; [1993] Mallal's Digest 1133.

For cases on adverse inference, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 77–119.

Cases referred to

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114 (refd)

Najar Singh v Government of Malaysia & Anor [1974] 1 MLJ 138 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Rules of the High Court 1980 O 53 r 1(2)

Appeal from: Originating Motion No 25–3–1994 (High Court, Johor Bahru)

Mohd Zawawi bin Salleh (*Teo Say Eng* with him) (Deputy Public Prosecutors) for the appellant.

Gana Muthusamy (*Gana Muthusamy & Co*) for the respondent.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): This is an appeal against an order of certiorari whereby the judge in the High Court, Johor Bahru quashed the decision of the Public Services Commission dismissing the respondent as a customs officer with effect from 11 January 1994.

By a letter dated 5 May 1993, the appellant (hereafter referred to as 'the PSC') required the respondent to show cause why he should not be dismissed from service by reason of a charge that he, whilst on duty as a customs officer, on 12 October 1989 at Johor Bahru, did smuggle certain goods (set out in a list attached to the letter) from Singapore and handed them over to one Wong Hong Hua at the roadside near Taman Daya, Johor Bahru. The charge further alleges that the act of handing over was witnessed by another customs officer from Johor Bahru. The show cause letter was accompanied by an acknowledgement of receipt which the respondent was required to sign and return, and which the respondent did on 25 May 1993.

On 8 June 1993, the respondent purported to show cause in a long letter. Briefly, the respondent denied the charge, and said that on 12 October 1989 he had gone to Singapore with two of his friends by the name of Hj Mansor bin Hj Yusof and Mohd Noh bin Ismail. He said he could call these two persons to show that they did not go to Singapore to buy the good listed in the charge. He further said that at about 1pm they had returned from Singapore, and that he had stopped over at the house of one Nasir bin Che Mat at Kempas, Johor Bahru. At 2.30pm, he left this place for work at the Johor Causeway, because he was on duty from 3–11pm. He stated further that he was never at the roadside near Taman Daya as

charged, and that he could call Nasir to prove that he was in the house of the latter at the material time. A

The respondent denied that he knew Wong Hong Hua, and queried why if he in fact had handed the goods listed to Wong Hong Hua, he was not arrested when he allegedly handed over the goods. Besides this, he claimed he got to know later that Wong Hong Hua had been charged in court and had admitted his guilt to the offence of knowingly participating in bringing in uncustomed goods. The respondent stated that it would not have been necessary for Wong Hong Hua to admit his guilt if indeed it was the respondent who had smuggled the goods in. The respondent demanded that there be an inquiry so as to permit him to cross-examine the witnesses against him, and to call witnesses in his own defence. B C

The PSC issued a letter dated 5 November 1993 stating that a committee of inquiry had been set up to investigate the matter further, to examine the witnesses, and to receive the relevant documents on 17 November 1993 at 9am at the bilik mesyuarat, Bahagian Pencegah, Jabatan Kastam dan Eksais DiRaja, Johor Bahru. The letter specifically informed the respondent that he was given leave to appear before the committee in order to cross-examine the witnesses, and to examine the relevant documents which were to be used in the inquiry. D

This letter was sent to the respondent on behalf of the Ketua Pengarah Kastam by Puan Habsah bte Hj Harun on 10 November 1993, together with the usual accompanying letter of acknowledgement of receipt. The respondent received this letter but he did not return the acknowledgement of receipt. The date that he received the letter was of crucial importance in this case. E

Before us, it was strenuously submitted that the respondent received this letter only on 16 November 1993, and that upon receipt of this letter the respondent had asked the Timbalan Pengarah Kastam, Puan Zaleha bte Hamzah, for an adjournment but that this was refused. Thereafter, on 8 February 1994, the respondent says he received a letter dated 25 January 1994 from the Secretary of the PSC who stated that at its meeting on 10 January 1994, the PSC had carefully considered the case against the respondent in its entirety, and had decided that he be dismissed from service with effect from 11 January 1994. F G

On 21 February 1994, the respondent filed a motion in the High Court, Johor Bahru for leave to apply for an order of certiorari. This application was supported by an undated statement under O 53 r 1(2) of the Rules of the High Court 1980, and an affidavit he affirmed on 21 February 1994. H

Paragraphs 6 and 7 of this affidavit reads:

> 6 On or about 16 November 1993, I received a letter from the Public Service Commission, Malaysia dated 5 November 1993 instructing me to attend an oral hearing at the Royal Malaya Customs and Excise's office, Johor Bahru, Johor at 9am on 17 November 1993. A copy of the said letter is now produced and marked as 'NBH3'. I

A 7 I was not given sufficient time to prepare my case, and my request and my counsel's request for an adjournment was refused.

It is to be noted that para 6 does not say he received the letter on the 16th but on or about the 16th. Since the letter was sent from Kuala Lumpur on 10 January, this could mean any date from the 11th onwards. As to para 7, B it is to be emphasized that the respondent was contending that he made a request, and that his counsel also made a request for an adjournment. When and to whom these requests were made were not specified.

In the appeal before us, the respondent's counsel contended that the PSC had dismissed the respondent simply upon the material contained in the show cause letter, and in the explanation given by the respondent in his C letter of 8 June 1993. He said that the refusal to grant the adjournment vitiated the dismissal, and suggested that we infer that no inquiry had in fact taken place on 17 November 1993 or at all. But the respondent's counsel was not previously involved in this matter and his knowledge of what actually went on at the inquiry stage or in the High Court did not go D beyond the four corners of the appeal record which we must now consider in depth.

The only material before the court at the uncontested hearing of the application for leave on 22 July 1994 was the motion, the statement pursuant to O 53 r 1(2), and the respondent's affidavit affirmed on E 21 February 1994. After leave was granted, the supporting documents for the motion proper were the same affidavit and statement aforesaid.

In her affidavit of 28 September 1994, Puan Habsah bte Hj Harun confirmed that the notice of the inquiry was sent on 10 November 1993, that the respondent did not return the acknowledgement receipt, and F neither the respondent nor his counsel made any request whatsoever for the postponement of the inquiry fixed on 17 November 1993.

In response to the respondent's contention that the PSC had acted contrary to the rules of natural justice and in excess of its jurisdiction, the Secretary of the PSC, Encik Abdul Rahman bin Hj Ahmad, affirmed and filed an affidavit dated 29 September 1994. In para 10 of this affidavit he G stated:

> Berhubung dengan perenggan 12 affidavit pemohon saya sesungguhnya menyatakan bahawa berasaskan kepada keterangan-keterangan dan fakta-fakta kes yang telah dikemukakan untuk pertimbangan Suruhanjaya Perkhidmatan Awam, keputusan untuk membuang kerja pemohon telah H dibuat dengan teratur berasaskan kepada kuasa-kuasa yang telah diberi oleh undang-undang.

The reference to 'keterangan-keterangan' and 'fakta-fakta kes' tends to suggest that the inquiry was in fact held on 17 November 1993. He went on to say that in arriving at its decision, the PSC excluded from its I consideration the material presented to the court in Wong Hong Hua's trial.

The respondent filed a reply affidavit dated 18 October 1994. In this affidavit he said:

3 Pada atau lebih kurang 16 November 1993, saya menerima daripada Puan Hasimah bte Ahmad, Penguasa Kastam Cawangan Perkhidmatan Perjawatan dan Latihan, Johor Bahru, satu surat dari Suruhanjaya Perkhidmatan Awam, Malaysia, bertarikh 5 November 1993 dengan saya meminta saya menghadiri pendengaran lisan di Jabatan Kastam dan Eksais DiRaja pada pukul 9 pagi pada 17 November 1993.

4 Saya memohon merujuk perenggan 4 afidavit tersebut dan menyatakan bahawa saya meminta Puan Zaleha untuk penangguhan tetapi diberitahu bahawa penangguhan tidak akan diberi dan siasatan akan diteruskan.

Once again he did not specify the actual date when he received the notice, and did not explain why he did not return the acknowledgement receipt letter. For the first time, he disclosed that his request for an adjournment was made to Puan Zaleha without any explanation as to why he chose this lady to address his request to. He does not say specifically when he asked her. Nor does he say why he did not ask Puan Habsah, or for that matter the Secretary of the PSC whose telephone number was given in the notice.

Finally, there is a total omission to clarify who his counsel was at that time, and to whom and when his counsel also made a request for an adjournment. In a situation such as this where the respondent was relying so heavily on the alleged refusal to grant an adjournment, the failure to produce such material evidence must result in s 114(g) of the Evidence Act 1950 being invoked, and an adverse inference must be drawn against the respondent.

Puan Zaleha bte Hamzah too filed an affidavit dated 1 November 1994, in which she categorically denied that any request whatsoever was made to her for an adjournment.

The trial judge however made a positive finding that the respondent did ask for an adjournment, and that since he was told that it would not be granted, had not presented himself at the hearing on 17 November 1993.

The content and the weight of the available evidence is overwhelmingly against these findings. Putting it at its lowest there was a sharp conflict of evidence as to whether the respondent had ever asked for an adjournment. Why should the bare word of the respondent prevail against the categoric assertion of public officers who had no axe to grind. Indeed the proper inference is that the respondent did not ask for an adjournment because had he done so, it would have been a simple enough matter, and obviously relevant thing to do, for him to have comprehensively disclosed at the earliest opportunity, ie on 21 February 1994, when and from whom he and his counsel had asked for an adjournment and in what circumstances their requests were refused.

We hold that it is the duty of a person applying for certiorari to show utmost good faith in the presentation of the material upon which he wishes the court to rely. Here the respondent has been very selective. He claims there was an error on the face of the record, but the only relevant record which he has produced is the letter of dismissal dated 25 January 1994. There is no error on the face of that record if it could be called such.

A The main ground on which the trial judge gave certiorari was that the PSC had unreasonably refused to grant an adjournment. As we have already said, there is no credible evidence of such a request having been properly made either before the 17th or on the 17th when the inquiry was to be proceeded with. The respondent does not explain why, if he wanted an adjournment, he did not ask for it from Puan Hasimah bte Ahmad from B whose hands he received the letter, or from the Secretary of the PSC. Nor is it clear why or how he made his alleged request to Puan Zaleha whose affidavit denying this shows she was then in Kuala Lumpur and was not the person at the headquarters who had the conduct of the matter. The proper tribunal to which the request should have been made would be the C committee of inquiry, if not earlier, at least on 17 November 1993. If as is suggested in his first affidavit that such a request was also made by his counsel, it must have been at the inquiry of the committee. It was his duty to produce a record of it or to explain its absence. We are inclined to the view that the inquiry had in fact proceeded on 17 November 1993 probably with the respondent and/or his counsel being present. As such it was the D record of that inquiry that should have been the subject of the certiorari. But it was not produced. If on the other hand, the inquiry had not taken place at all, there should have a very positive evidence to that effect.

The learned trial judge having found that the request for an adjournment had been unreasonably refused went on to speculate on the E proper inferences the committee should have drawn from the facts of the case against Wong Hong Hua. As has been pointed out, the evidence tendered at the inquiry on 17 November 1993 was not before him. Relying solely on the show cause letter and the respondent's reply, he appears to have concluded that if in fact the respondent had handed over the smuggled F goods to Wong Hong Hua, the respondent would have been jointly charged with Wong Hong Hua and since this did not happen, it pointed to the respondent's innocence.

With respect we do not feel that such a finding was justified. Admittedly the goods which were the subject matter of the charge against Wong were the same goods involved in the charge against the respondent. G It is to be noted that the respondent only produced a part of the notes of evidence of the criminal trial. What Wong said in mitigation, and what and when the findings of the criminal court were made is a blank. The notes are not certified, and the court should not take judicial notice of its accuracy. We do not think that the omission to charge the respondent H jointly with Wong proves that the respondent was innocent.

We have been very disturbed by the fact that the transaction which is the subject matter of this case took place in 1989, but disciplinary action was initiated only in 1993 especially as the charge states that the respondent was seen committing the offence by a customs officer. If clear proof had been forthcoming that a request for an adjournment had been made on I 16 or 17 November 1993, and it had been unreasonably refused, this appeal may well have gone the other way, and we may have adopted the dicta in *Najar Singh v Government of Malaysia & Anor* [1974] 1 MLJ 138

at p 141, and *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114, which the trial judge referred to in his judgment. To avoid the kind of criticism which has been made in this case, it would be a salutary practice for the PSC to give alleged offenders at least three weeks' advance notice to be present for the inquiry, since as a rule, two weeks at least is given to show cause in the first instance.

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But the granting of an adjournment is always a discretionary matter, and whether a refusal is so unreasonable as to vitiate the decision reached is a matter to be considered in the light of all the circumstances. The least the respondent could and should have done was to produce the record of the inquiry. This he has not done. This onus which is always upon the applicant has not been discharged in the present case. Putting it at its lowest, he has not ventured to explain the absence of the notes of evidence of the inquiry in the papers which he filed in court.

C

In the result, we are of the view that this was not a proper case for certiorari. We therefore allow this appeal and set aside the order of the judge with costs both here and the court below to be paid by the respondent to the appellant.

D

Appeal allowed.

Reported by Isabel Liong

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